RECORD
AND
BRIEF

No. 15-1204

In the Supreme Court of the United States

DAVID JENNINGS, *ET AL.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE. NW
SUITE 200
WASHINGTON, DC 20036
(202) 202-355-9452
lj@larryjoseph.com

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

Pursuant to this Court' Order dated December 15, 2016, supplemental briefing in this action presents three questions:

1. Whether the Constitution requires that aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. § 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months.

2. Whether the Constitution requires that criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

3. Whether the Constitution requires that, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.

TABLE OF CONTENTS

Questions Presented i
Table of Contents ii
Table of Authorities iv
Interest of *Amicus Curiae* 1
Statement of the Case 2
Constitutional Background 3
Statutory Background 4
Regulatory Background 5
Factual Background 5
Summary of Argument 6
Argument 8
I. This litigation does not provide an appropriate vehicle to decide constitutional questions. 8
A. Outside of the original *habeas corpus* action, judicial review is precluded by statute and sovereign immunity 8
B. In almost all – if not all – cases, the alien's detention is the alien's choice. 13
C. Aliens lack independent standing to bail hearings without showing a concrete injury 15
D. Aliens cannot use a class-action suit to set facial rules for future individualized hearings when many – indeed most – class members have no claim to relief. 16
E. The Declaratory Judgment Act does not expand this Court's jurisdiction to cover the procedural protections Aliens seek 19
F. Director Jennings is the only proper defendant-respondent 20

II. If it reaches the constitutional merits, this Court should rule for the Government..... 21
A. Six months of detention do not trigger Due Process rights for aliens. 21
1. The six-month trigger does not apply to the Arriving Class of aliens..... 24
2. The six-month trigger does not apply to the Mandatory Class of aliens..... 25
B. The Constitution does not support the Ninth Circuit's procedural demands. 26
1. The Government does not bear the burden of proof on flight risk or danger to the community..... 26
2. If the government bore the burden of proof, the quantum of proof would not be clear and convincing evidence. 27
3. The Constitution does not compel new hearings, automatically, every six months, without material change to a detainee's circumstances. 28
Conclusion 29

TABLE OF AUTHORITIES

Cases

Air New Zealand Ltd. v. C.A.B.,
726 F.2d 832 (D.C. Cir. 1984) 12

Armstrong v. Exceptional Child Ctr., Inc.,
135 S.Ct. 1378 (2015) 29

Auer v. Robbins,
519 U.S. 452 (1997) 29

Barker v. Wingo,
407 U.S. 514 (1972) 23

Bennett v. Spear,
520 U.S. 154 (1997) 3-4

Brockett v. Spokane Arcades,
472 U.S. 491 (1985) 18

Calderon v. Ashmus,
523 U.S. 740 (1998) 20

Carlson v. Landon,
342 U.S. 524 (1952) 26

Christopher v. Harbury,
536 U.S. 403 (2002) 16

Clapper v. Amnesty Int'l USA,
133 S.Ct. 1138 (2013) 14, 15

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 4, 14

Demore v. Kim,
538 U.S. 510 (2003) 3, 10-12, 16, 21-23, 25, 27

Dept. of Army v. Blue Fox, Inc.,
525 U.S. 255 (1999) 9

Doe v. Reed,
561 U.S. 186 (2010) 17-18

Duke Power Co. v. Carolina Envtl. Study Grp.,
438 U.S. 59 (1978) 19

Ex parte Young,
209 U.S. 123 (1908) 9

F.C.C. v. Beach Communications, Inc.,
508 U.S. 307 (1993) 23, 28

Fiallo ex rel. Rodriguez v. Bell,
430 U.S. 787 (1977) 25

Gonzales v. Carhart,
550 U.S. 124 (2007) 17

Green v. Mansour,
474 U.S. 64 (1985) 9

I.N.S. v. Nat'l Ctr. for Immigrants' Rights,
502 U.S. 183 (1991) 17

INS v. St. Cyr,
533 U.S. 289 (2001) 18-19

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573 (2010) 14

Kleindienst v. Mandel,
408 U.S. 753 (1972) 3, 25

Landon v. Plasencia,
459 U.S. 21 (1982) 14-16, 21

Lane v. Pena,
518 U.S. 187 (1996) 9

Lehnhausen v. Lake Shore Auto Parts Co.,
410 U.S. 356 (1973) 23, 28

Lewis v. Casey,
518 U.S. 343 (1996) 14

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 15-16

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981) 23
Montana v. U.S.,
440 U.S. 147 (1979) 10
Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 18
Penfield Co. v. SEC,
330 U.S. 585 (1947) 13
Pennsylvania v. New Jersey,
426 U.S. 660 (1976) 14, 15
Pub. Serv. Comm'n v. Wycoff Co.,
344 U.S. 237 (1952) 20
Reno v. Flores,
507 U.S. 292 (1993) 3, 21
Rumsfeld v. Padilla,
542 U.S. 426 (2004) 20-21
Schaffer v. Weast,
546 U.S. 49 (2005) 26, 27
Schlanger v. Seamans,
401 U.S. 487 (1971) 21
Sea-Land Serv., Inc. v. Alaska R.R.,
659 F.2d 243 (D.C. Cir. 1982) 10
Shaughnessy v. U.S. ex rel. Mezei,
345 U.S. 206 (1953) 16, 21-22, 24
Simon v. Eastern Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 3
Sorrell v. IMS Health Inc.,
131 S.Ct. 2653 (2011) 17
Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 16

Susan B. Anthony List v. Driehaus,
134 S.Ct. 2334 (2014) 18
U.S. ex rel. Knauff v. Shaughnessy,
338 U.S. 537 (1950) 28
U.S. v. King,
395 U.S. 1 (1969) 9
U.S. v. Mendoza,
464 U.S. 154 (1984) 10
U.S. v. Salerno,
481 U.S. 739 (1987) 17, 19
U.S. v. Sherwood,
312 U.S. 584 (1941) 9
Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,
454 U.S. 464 (1982) 3
Walters v. Reno,
145 F.3d 1032 (9th Cir. 1998) 10
Wilkinson v. Dotson,
544 U.S. 74 (2005) 10
Zadvydas v. Davis,
533 U.S. 678 (2001) 3, 9, 13, 24, 26, 28

Statutes

U.S. CONST. art. I, §8, cl. 4 3
U.S. CONST. art. I, §9, cl. 2 18-19
U.S. CONST. art. III 3, 6-7, 14-16, 20
U.S. CONST. art. III, §2 3
U.S. CONST. amend. V 3
U.S. CONST. amend. V, cl. 4 ..... 7,-8, 16, 21-22, 24
Administrative Procedure Act,
5 U.S.C. §§551-706 12

5 U.S.C. §553(e) 29
5 U.S.C. §701(a) 6
5 U.S.C. §701(a)(1) 12
5 U.S.C. §701(a)(2) 12
5 U.S.C. §702 ..... 6, 10-12
5 U.S.C. §704 ..... 6, 11-12
Immigration & Naturalization Act,
8 U.S.C. §§1101-1537 4
8 U.S.C. §1225(b) 2
8 U.S.C. §1226(a) 2
8 U.S.C. §1226(c) 2
8 U.S.C. §1226(e) 4-5, 6, 11-12, 22
8 U.S.C. §1252(g) 4, 6, 10-12, 20, 22
8 U.S.C. §1601(6) 22
8 U.S.C. §1182(d)(5)(A) 5
28 U.S.C. §1331 8-9
28 U.S.C. §1651(a) 20
Declaratory Judgment Act,
28 U.S.C. §§2201-2202 ..... 7, 19-20
28 U.S.C. §2201(a) 19, 20
28 U.S.C. §2241 ..... 4, 8-9, 19-20
28 U.S.C. §2242 19
28 U.S.C. §2243 19
28 U.S.C. §2401(a) 29
42 U.S.C. §1983 10

Rules, Regulations and Orders

S.Ct. Rule 37.6 1
8 C.F.R. §1003.19(e) 5, 29

Other Authorities

Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855 (Mar. 2015) 18

No. 15-1204

In the Supreme Court of the United States

DAVID JENNINGS, *ET AL.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("EFELDF") is a nonprofit corporation founded in 1981.[1] For more than thirty-five years, EFELDF has defended American sovereignty and promoted adherence to federalism and the separation of powers under the U.S. Constitution. In addition, EFELDF has consistently opposed unlawful behavior, including illegal entry

[1] This *amicus* brief is filed with written consent of all parties; the parties' written consents have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief; no party's counsel authored this brief in whole or in part, nor did any person or entity other than *amicus*, its members, and its counsel make a monetary contribution to the preparation or submission of this brief.

into and residence in the United States, and supported enforcing immigration laws. For all these reasons, EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

On behalf of a class of aliens detained by the Los Angeles District of the Immigration and Customs Enforcement ("ICE"[2]) for six months or longer, awaiting the resolution of their removal or admission process, a group of aliens (hereinafter, "Aliens") have sued the Field Office Director and several higher-ranking federal officers (collectively, the "Government") to seek periodic bond hearings at which an immigration judge can assess Aliens' eligibility for bail, in light of the class members' flight risk and danger to the community. The lower courts divided the class into three subclasses, based on the statutes under which the aliens are detained: Sections 1225(b), 1226(c), and 1226(a). 8 U.S.C. §§1225(b), 1226(a), (c). Of the three subclasses, only the Section 1225(b) detainees already received an initial bail hearing. The other two classes are also known as the "Arriving Class" for aliens taken into custody at the border, 8 U.S.C. §1226(a), and the "Mandatory Class" for convicted criminals in removal proceedings, *id.* §1226(c). In addition to claiming a due-process right to periodic bond hearings, Aliens also seek favorable procedural facets connected to those hearings, such as shifting the burden of proof to the Government.

---

[2] ICE is the successor within the Department of Homeland Security ("DHS") of the former Immigration and Naturalization Service ("INS").

Constitutional Background

Congress – and thus its enforcement and rule-making delegates in the Executive Branch – have plenary authority over immigration. U.S. CONST. art. I, §8, cl. 4; *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). While "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings," *Reno v. Flores*, 507 U.S. 292, 306 (1993), it is at least as well established that "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003). The due-process inquiry thus concerns what process is due in a particular setting. In general, courts intervene only when detention ceases to serve its immigration role – such as when detention becomes permanent, and thus punitive – because the detention then leaves the immigration context – which allows it – and becomes a potential due-process violation. *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001).

Under Article III, federal courts are limited to hearing cases and controversies, U.S. CONST. art. III, §2, which is relevant here primarily in the "bedrock requirement" of standing. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). This limit is "fundamental to the judiciary's proper role in our system of government." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). In both its constitutional and prudential strands, standing is "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (interior

quotations and citations omitted). Indeed, standing is "*crucial* in maintaining the tripartite allocation of power set forth in the Constitution." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (interior quotations omitted, emphasis added).

Statutory Background

The parties outline federal immigration law, Gov't Br. at 2-8; Aliens Br. at 2-5, so *amicus* EFELDF focuses only on the statutory provisions salient to this brief, which are the preclusion-of-review provisions. 8 U.S.C. §§1252(g), 1226(e). Because they go to jurisdiction but were not set out in the appendix, *amicus* EFELDF sets them out in full here.

First, §1252(g) broadly limits any cause arising from the Government's decision to commence proceedings against any alien under the Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 ("INA"):

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

8 U.S.C. §1252(g) (citations omitted).

Second, §1226(e) limits judicial review of the Government's "discretionary judgment" regarding the application §1226:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

8 U.S.C. §1226(e).

Regulatory Background

The Government's implementing regulations provide for bail hearings, but only upon material changes from the prior bond determination:

> After an initial bond redetermination, an alien's request for a subsequent bond redetermination shall be made in writing and shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination.

8 C.F.R. §1003.19(e).[3]

Factual Background

EFELDF adopts the facts as stated in the Government's supplemental brief (at 10-17). In summary, "when class members' cases were completed, the alien was virtually always found removable and usually ordered removed." Gov't Suppl. Br. at 16. Indeed, "[f]ewer than 5% of studied

---

[3] In addition to the material-change regulation, DHS may release aliens into the United States on parole, "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. §1182(d)(5)(A).

class members with completed cases won a 'termination.'" *Id.* (*citing* J.A. 199). In other words, "more than 95% were found removable," *id.*, which means that they lacked any substantive right to be at liberty inside the United States.

SUMMARY OF ARGUMENT

Before addressing the three questions presented by the supplemental briefing order, *amicus* EFELDF first discusses the jurisdictional and prudential issues that go to whether this Court can or should reach the merits issues under the Constitution.

At the outset, the systemic-review aspect of this hybrid *habeas* action violates preclusion-of-review provisions, including both statutory provisions, 8 U.S.C. §§1252(g), 1226(e), and nonstatutory ones, 5 U.S.C. §§701(a), 702, 704, which implicates the lack of a waiver of sovereign immunity and, thus, a lack of jurisdiction (Section I.A). Moreover, the fact that Aliens have no right to be at large in the United States means that they cannot manufacture that right by voluntarily coming or staying here under the available terms and then protesting those terms, which trigger both a lack of entitlement to equitable relief and a self-inflicted injury in their detention for purposes of Article III (Section I.B). Similarly, to have procedural standing for their bond hearings, Aliens need to establish a concrete and cognizable injury, which they generally cannot do because they lack concrete rights vis-à-vis their liberty to be at large in the United States (Section I.C). In essence, Aliens seek facial relief in a facial challenge to detentions longer than six months, which this Court should dismiss because in most of the instances here, the

detention is perfectly legal under the Due Process Clause (Section I.D). Even if Aliens would have an Article III case or controversy in their individual habeas actions, the Declaratory Judgment Act does not create jurisdiction for a piecemeal review of the bond-hearing issue that Aliens ask this Court to resolve (Section I.E). Finally, the immediate-custodian rule makes the director of the detention facility the only proper respondent to Aliens' habeas petition, and the other defendants-respondents must be dismissed (Section I.F).

With regard to the merits of the three questions presented, *amicus* EFELDF respectfully submits that Aliens are not entitled to any relief. As to both classes, Aliens' lack of a right to be in the United States works against their entitlement to a bond hearing, absent a factor – such as dilatory Government behavior or a material change, for which hearings remain available by regulation and via habeas review, without this litigation – and Aliens' theorizing otherwise based on policy arguments and conjecture do not negative the Government's legitimate position under the rational-basis test that applies in the absence of a fundamental right or protected class (Section II.A). In any event, this Court's precedents foreclose relief for both the Arriving Class (Section II.A.1) and the Mandatory Class (Section II.A.2). The Government should not bear the burden of proof in bond hearings because this Court has upheld instances where the detainees bore that burden and because the default rule in civil cases is that the plaintiff or movant (here, Aliens) bears the burden of proving entitlement to the relief it seeks (Section II.B.1). Because this is a rational-basis type

of due-process claim in which the movants have no right to release, the burden – if the Government bears it at all – should not be an elevated burden (Section II.B.2). Finally, for similar reasons, this Court should not require considering length of detention in bail hearings because that would likely lead to more delay, and in any event this Court should force Aliens to file a rulemaking petition before allowing a time-barred claim against the bond-hearing rule, especially when Aliens raise policy-based arguments that they did not submit to the agency during the prior notice-and-comment rulemaking (Section II.B.3).

ARGUMENT

I. THIS LITIGATION DOES NOT PROVIDE AN APPROPRIATE VEHICLE TO DECIDE CONSTITUTIONAL QUESTIONS.

For several jurisdictional and prudential reasons, this litigation is not an appropriate vehicle for the systemic review of alien removal procedures that the courts below promulgated under the Due Process Clause. For those reasons, in addition to reversing the Ninth Circuit's statutory holdings, this Court should deny constitutional relief either prudentially or jurisdictionally.

A. Outside of the original *habeas corpus* action, judicial review is precluded by statute and sovereign immunity.

Although this case began as a pure *habeas corpus* action, the third – and operative – amended complaint combines an aspect of systemic review of immigration policy: "This action is both a complaint for declaratory and injunctive relief under 28 U.S.C. 1331 and a petition for writ of habeas corpus under 28 U.S.C.

2241[.]" Third Am. Compl. ¶2 n.1. Whether that type of bootstrapping might work in some contexts, the Aliens cannot bring such a suit against our federal sovereign in this immigration context. Even if §1331 provides the district courts with general subject-matter jurisdiction for federal questions, that subject-matter jurisdiction does not address the immigration-specific preclusion-of-review statutes or the United States' sovereign immunity.

Of course, the "United States, as sovereign, is immune from suit save as it consents to be sued." *U.S. v. Sherwood*, 312 U.S. 584, 586 (1941). A waiver of sovereign immunity is thus a necessary prerequisite to a court's exercise of jurisdiction over the United States. *See, e.g., U.S. v. King*, 395 U.S. 1, 4 (1969). Such a waiver "must be unequivocally expressed in the statutory text" and "strictly construed, in terms of its scope," in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit," without regard to any perceived unfairness, inefficiency, or inequity. *Dept. of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). Here, the relief afforded Aliens by the courts below exceeds the limited relief available.[4]

To support the complaint's assertion that "28 U.S.C. 1331 ... confers jurisdiction to consider federal

---

[4] The "officer suit" exception in *Ex parte Young*, 209 U.S. 123 (1908), provides a limited exception to sovereign immunity, but only for *ongoing violations* of federal law. *Green v. Mansour*, 474 U.S. 64, 66-67 (1985). Accordingly, the only relief available against the United States would apply to individual *Zadvydas*-like cases, not to all detained Aliens.

questions," Third Am. Compl. ¶2, the Aliens rely principally on *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998), in which the Ninth Circuit rejected the Government's objection to an injunction against future deportations. There, the Government – which did not question jurisdiction generally – cited 8 U.S.C. §1252(g) as precluding any injunctive relief for future class members. Even if it did not involve other statutes and issues, *Walters* would not be binding on either this Court or the Government in this case. *Compare Montana v. U.S.*, 440 U.S. 147, 153 (1979) *with U.S. v. Mendoza*, 464 U.S. 154, 162 (1984).[5] If the lower courts lacked jurisdiction for the systemic-review facets of this case, no such relief is available here, even if the parties have not briefed the jurisdictional issues here.[6]

As to sovereign immunity, the 1976 amendments to 5 U.S.C. §702 "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. Rep. No. 996, 94th Cong., 2d Sess. 8 (1976); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9 (1976), 1976 U.S. Code Cong. & Admin. News 6121, 6129) (R.B. Ginsburg, J.). But that

---

[5] The other case that Aliens cite – *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) – concerns availability of §1983 actions to review parole-release procedures. *See* Third Am. Compl. ¶2. Because *Wilkinson* concerned state actors, the federal government's sovereign immunity obviously was not at issue.

[6] "Although the parties did not raise the issue in their briefs on the merits, we must first consider whether we have jurisdiction to decide this case." *Demore*, 538 U.S. at 516 (*quoting Florida v. Thomas*, 532 U.S. 774, 777 (2001)).

waiver itself has restrictions, including withholding of "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought," 5 U.S.C. §702, and – for issues not expressly reviewable by statute – allowing review only where "there is no other adequate remedy in a court." *Id.* §704. Here, legally adequate review is available under the allowance for *habeas corpus*, and that review in the immigration context has several limits on review that preclude resort to §702's broad waiver.

In *Demore*, this Court held that §1226(e) does not preclude "challenges [to] the statutory framework that permits ... detention without bail." 538 U.S. at 516-17. *Amicus* EFELDF respectfully submits that the Court's reasoning in *Demore* does not save Aliens here for three reasons.

First, unlike in *Demore*, Aliens here claim a due-process right to compel the Government to use less-intrusive alternative to detention (*e.g.*, intensive supervision). *See* Aliens Suppl. Br. at 7, 28, 36-37. Weighing detention versus supervised release is precisely the "discretionary judgment regarding the application of this section" that §1226(e) shields from review.

Second, and along the same lines, §1252(g) precludes both statutory and nonstatutory review "to hear *any* cause or claim by or on behalf of any alien *arising from* the decision or action by the Attorney General to *commence proceedings, adjudicate cases*, or execute removal orders." 8 U.S.C. §1252(g) (emphasis added). Unlike §1226(e), §1252(g) applies beyond §1226 and extends more broadly than §1226(e)'s

"discretionary judgment" to reach "*any* cause or claim ... *arising from* the decision ... to commence proceedings ... against any alien under this Act." 8 U.S.C.S. §1252(g) (emphasis added); *see also* 5 U.S.C. §701(a)(2) (precluding review of "agency action ... committed to agency discretion by law").

Third, the nonstatutory review provisions in the Administrative Procedure Act ("APA") and its waiver provision cut against review.[7] Because statutory preclusion-of-review provisions apply here, 8 U.S.C. §§1252(g), 1226(e), the United States' general waiver of sovereign immunity does not apply. 5 U.S.C. §702; *accord id.* §701(a)(1). Similarly, the *habeas corpus* remedy is a legally adequate one, even if class members prefer other methods of review. Transcript of Oral Argument at 42:17-24, *Jennings v. Rodriguez*, No. 15-1204 (U.S) (hereinafter, "Transcript"). As such, the waiver of sovereign does not extend to alternate procedures because there is an adequate *habeas* remedy. 5 U.S.C. §§702, 704.

In short, the Court's decision to review systemic issues in *Demore* is not supportable here. This should not be surprising, moreover, because – unlike in *Demore* – the statutory scheme has not broken down here (*i.e.*, the removal proceedings are all on track, with an end in sight).

---

[7] The Court perhaps should distinguish between non-statutory review and special forms of statutory review, as the enactment of statutes such as the APA has rendered "nonstatutory" something of a "misnomer." *Air New Zealand Ltd. v. C.A.B.*, 726 F.2d 832, 836-37 (D.C. Cir. 1984) (Scalia, J.).

B. In almost all – if not all – cases, the alien's detention is the alien's choice.

The detentions here are all in service of pursuing the detainee's decision to try to gain entry into or avoid removal from the United States. Each detainee is free to pursue that legal issue – entry or removal – from abroad.[8] The only thing that keeps most – and probably all – class members in detention is their own decision to remain here while the process resolves. To the extent that the detainees have a credible fear that they would face persecution in their homeland, other countries are available. Thus, although the Aliens try to analogize their detentions to compelled detention in the criminal or civil contexts that apply to residents of this Nation, that analogy is inapposite. Contrary to compelled detainees, the detainees here "carry the keys of their prison in their own pockets." *Penfield Co. v. SEC*, 330 U.S. 585, 590 (1947) (interior quotations omitted). The detainees' ability to escape detention by simply leaving the United States undermines Aliens' claims in two respects, one that goes to the equities and one that goes to jurisdiction.

First, because the detainees choose detention over the other perfectly viable and lawful choice – leaving the United States – they cannot credibly ask a court to compare them to lawful residents facing compelled civil or criminal detention. In general, the detainees

---

[8] Of course, if any particular detainee – for whatever reason – cannot go *anywhere* else in the world while the parties resolve that detainee's right to reside in the United States, detention might cease to serve the intended immigration function, and that detainee could seek relief under the rationale of *Zadvydas*. But that is for the detainee to establish. *See* Section II.B.1, *infra*.

have no right to be in the United States, *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application"), and thus can be excluded as an act of sovereignty.[9] *Id.* Since no one is keeping them here, they cannot credibly challenge the legislative grace that allows them to stay at the taxpayers' expense.[10]

Second, under standing's causation requirement, a "self-inflicted injury" cannot manufacture an Article III case or controversy. *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1152-53 (2013); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). *Amicus* EFELDF does not dispute that the detainees have an Article III case or controversy with the United States as to the question of whether the detainees can remain here, but "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006). Aliens cannot bootstrap a *Due Process claim* to release into the United States when their actual case involves only an *immigration claim* as to whether they can enter or remain in the United States. Pending the resolution of their immigration claim, Aliens must choose

---

[9] Although they end up in a similar legal posture, *see* Section II.A.2, *infra*, legal permanent residents ("LPRs") who lose their LPR status upon conviction of certain crimes are different in this respect: they have been admitted into the United States.

[10] Whether detainees knew the law or not prior to coming to the United States, they are charged with knowing the law: "We have long recognized ... that ignorance of the law will not excuse any person, either civilly or criminally." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 581 (2010) (interior quotations omitted).

between detention and leaving. The choice they make does not entitle them to raise new claims.

Simply put, these aliens have no right to remain in or be at large in the United States, *Plasencia*, 459 U.S. at 32, and they cannot manufacture that right by coming here and then protesting the terms of being here. *Clapper*, 133 S.Ct. at 1152-53. Having the right to a determination of admissibility does not create the right to reside in the United States while the system answers the first question. If they want the certainty of avoiding detention during the pendency of the immigration proceedings, Aliens need to apply for admission or non-removability from abroad.

C. Aliens lack independent standing to bail hearings without showing a concrete injury.

As indicated in Section I.B, *supra*, Aliens lack an independent right to be in the United States while their immigration proceedings resolve. Attempting to avoid the Government's claim to plenary authority over admissions, Aliens claim to "seek procedures as to their detention rather than their admission." Aliens Suppl. Br. at 20. Because they lack a substantive right to be in the United States, however, Aliens also lack a procedural right to bail hearings beyond those already afforded them (*e.g.*, upon material change in their circumstances or *habeas corpus* rights).

Under Article III, Aliens cannot have a procedural due-process right without having a substantive right first: "the procedures in question [must be] designed to protect some threatened concrete interest of his that is the ultimate basis of his standing," which is "apart from his interest in having the procedure

observed." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992); *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("deprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing"); *cf. Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002) (denial-of-access rights are "ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court"). The Due Process Clause does not afford Aliens the right to be released into the United States pending resolution of their immigration proceedings. *Plasencia*, 459 U.S. at 32; *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Demore*, 538 U.S. at 523 ("detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process"). Alternatively, the Court could analyze the issue as statutory standing. *See* Section II.A, *infra*. Either way, Aliens do not have a procedural-only right to a bond hearing because they lack a concrete right to be released into the United States pending the end of their admissions or removal procedures.

D. Aliens cannot use a class-action suit to set facial rules for future individualized hearings when many – indeed most – class members have no claim to relief.

Although this case commenced as a *habeas corpus* action, it subsequently morphed into a facial, systemic challenge to removal procedures under federal immigration law. In seeking periodic bond hearings, with burdens of proof, standards of review, and a ruling as to the impact of the duration of detention in

a bond hearing, Aliens' suit seeks relief utterly removed from the specific facts of any one litigant. Any yet, most of the litigants would not be entitled to the relief that Aliens seek as a class, if the individual litigants were analyzed individually. *Amicus* EFELDF respectfully submits that this Court should recognize this as a facial challenge and then dismiss it because Aliens failed to "establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno,* 481 U.S. 739, 745 (1987). Quite the contrary, the Government's policies are valid in most, if not all, circumstances presented by this litigation.

Of course, a "facial challenge to a legislative Act is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno,* 481 U.S. at 745. Because "[t]he fact that [the law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid," *id.*, prevailing in an as-applied challenge is simply not the same as prevailing in a facial challenge. *Sorrell v. IMS Health Inc.,* 131 S.Ct. 2653, 2665 (2011); *I.N.S. v. Nat'l Ctr. for Immigrants' Rights,* 502 U.S. 183, 188 (1991). Because "[a]s-applied challenges are the basic building blocks of constitutional adjudication," *Gonzales v. Carhart,* 550 U.S. 124, 168 (2007) (interior quotations and alterations omitted), this Court has ample reason to decline the facial systemic relief that Aliens seek

Generally, where relief would reach beyond the particular parties' circumstances, the party seeking that relief "must ... satisfy [the] standards for a facial

challenge to the extent of that reach." *Doe v. Reed*, 561 U.S. 186, 194 (2010). Similarly, where the complaint's "claims are better read as facial objections" to the law, courts need "not separately address the as-applied claims." *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2340 n.3 (2014). Quite simply, there is little to distinguish facial challenges from class challenges like this one. Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 886 (Mar. 2015) ("facial challenge to the constitutionality of a statute, regulation, ordinance, or policy can be thought of as an implicit class action"). This Court should recognize that, while styled initially under *habeas corpus*, this litigation is a facial challenge to federal removal procedures.

Aliens cannot use heightened burdens that a few class members allegedly face to alleviate other class members from burdens that this Court's precedents deem tolerable. In short, neither Aliens nor the lower courts can use this litigation as a vehicle to adopt immigration policy via court decree for all aliens: "The statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact." *Brockett v. Spokane Arcades*, 472 U.S. 491, 504 (1985). Thus, a reviewing court would need to tailor the injunctive relief to the actual violations (if any), as distinct from the "blunderbuss" facial injunction proposed here. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).[11] Because the

---

[11] Our common-law tradition and its limits are particularly compelling here, where the existence of Aliens' *habeas corpus* action depends in part on the Suspension Clause. *INS v. St. Cyr*,

claims here easily fail the *Salerno* test, this Court should either remand with orders to dismiss or reject the availability of class-wide declaratory relief on so thin a record of actual constitutional concerns.[12]

E. The Declaratory Judgment Act does not expand this Court's jurisdiction to cover the procedural protections Aliens seek.

Although the Declaratory Judgment Act, 28 U.S.C. §§2201-2202, "expands the scope of available remedies" that a federal court can provide, it "does not expand [the court's] jurisdiction." *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 71 n.15 (1978). The prospective declaratory relief that Aliens seek would be an expansion of the relief available in their core *habeas corpus* action or actions, making the additional declaratory relief that Aliens request an improper expansion of the judicial review authorized under the *habeas* statutes. *See* 28 U.S.C. §§2241-2243. But more importantly, the relief that Aliens seek would not resolve the case or controversy that Aliens have with the United States (namely, their detention).

---

533 U.S. 289, 300-01 (2001) ("at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789'") (*quoting Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)).

[12] Aliens claim that the Government waived any objection to whether typicality and commonality are present by failing to appeal the class-certification rulings. Transcript, at 45:1-15. But declaratory relief is discretionary, Section I.E, *infra*, and this Court can decline to issue facial, systemic declaratory relief under the Constitution to a class that clearly does not deserve the relief. 28 U.S.C. §2201(a).

Under this Court's precedents on the Declaratory Judgment Act,[13] that is an insufficient basis on which to issue declaratory relief. *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 246 (1952) (declaratory relief inappropriate because the "proposed decree cannot end the controversy"); *Calderon v. Ashmus*, 523 U.S. 740, 749 (1998) (declaratory relief improper where it "would not completely resolve [petitioner's] challenges, but would simply carve out one issue in the dispute for separate adjudication"). To the extent that Aliens lack standing for their procedural claims, separate from their immigration claims, *see* Sections I.B-I.C, *supra*, the Declaratory Judgment Act clearly cannot extend Aliens' claims to include the procedural claims. But even if Aliens satisfy Article III, the Declaratory Judgment Act's discretionary nature, 28 U.S.C. §2201(a) ("any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party") (emphasis added), would justify this Court's declining to grant constitutional relief on this record.

F. Director Jennings is the only proper defendant-respondent.

Consistent with the plain language of the *habeas corpus* statute, 28 U.S.C. §2241, the common-law "immediate custodian rule" makes the director of the detention facility the only proper respondent here.

---

[13] The All Writs Act cited by Aliens, Third Am. Compl. ¶2, is inapposite, both because 8 U.S.C. §1252(g) specifically precludes resort to it and, more importantly, because the requested relief here does not *preserve* future appellate jurisdiction, 28 U.S.C. §1651(a), given that Aliens can pursue their claims independently both in detention and from abroad.

Rumsfeld v. Padilla, 542 U.S. 426, 434-36 (2004); *Schlanger v. Seamans*, 401 U.S. 487, 489-91 (1971). The non-custodial Executive-Branch officials are improper respondents, *id.*, and must be dismissed.

II. IF IT REACHES THE CONSTITUTIONAL MERITS, THIS COURT SHOULD RULE FOR THE GOVERNMENT.

As indicated, either as a prudential or jurisdictional matter, this Court should – and potentially must – dismiss Aliens' claims without granting the merits relief that Aliens seek. To the extent that it reaches the merits of Aliens' claims, this Court should deny that relief for the reasons argued by the Government, as well as the reasons outlined below.

A. Six months of detention do not trigger Due Process rights for aliens.

Although Aliens understandably resent detention pending completion of their immigration proceedings, they simply have no right to be in the United States until those proceedings resolve, *Plasencia*, 459 U.S. at 32, and "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523.[14] Quite simply, the Due Process Clause does not aid Aliens here because "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is

---

[14] As explained in Section I.B, *supra*, Aliens' analogy to civil and criminal commitment hearings is inapposite because Aliens lack the due-process rights that citizens and residents have in those other proceedings. *Reno v. Flores*, 507 U.S. 292, 305-06 (1993) ("in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens") (interior quotations omitted).

concerned." *Mezei*, 345 U.S. at 212 (interior quotations omitted).

While understandable, Aliens' preference for supervised release over detention is neither an entitlement nor a constitutional command: "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Demore*, 538 U.S. at 528. While good policy arguments may support supervised release in some instances, a grant or denial of that relief is purely discretionary and thus unreviewable. 8 U.S.C. §§1252(g), 1226(e); *see* Section I.A, *supra*.

Moreover, wholly apart from an individualized due-process analysis for a particular alien, federal authorities – either Congress or its delegates in the Executive Branch – may legitimately have concluded that such supervised release would act as a magnet for further illegal immigration (*i.e.*, come to the United States, spend six months in detention, and get released). *Cf.* 8 U.S.C. §1601(6) ("[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits"). That *possibility* suffices to rebut Aliens' theoretical arguments that Aliens deserve release because good arguments correlate with lengthy proceedings, and released aliens will not want to abandon those good arguments by absconding. Transcript, at 52:9-19. *Amicus* EFELDF respectfully submits that that type of rule would result in more protracted proceedings, but the Court need not address Aliens' conjecture.

Quite simply, under the rational-basis test, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data," *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).[15] Consequently, rational-basis plaintiffs must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal quotations omitted). By contrast, plaintiffs cannot prevail even by marshaling "impressive supporting evidence ... [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose, but must instead negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981) (emphasis in original). Aliens' conjecture – while not evidence – would not help Aliens, even if it were evidence.

In any event, this Court already has resolved the issue that Aliens raise. Provided that the detention is neither punitive nor indeterminate, detention during the resolution of the immigration proceedings here does not violate Due Process. *Demore*, 538 U.S. at 523. In situations like this, "where justice is supposed to be swift but deliberate," a court "cannot definitely say how long is too long." *Barker v. Wingo*, 407 U.S. 514, 521 (1972).[16] Under the circumstances, this Court

---

[15] The rational-basis test applies because the due-process right here involves neither fundamental rights nor protected classes. *Id.* at 313.

[16] *Amicus* EFELDF thus submits that this Court should not set *any* timeline here, but the Ninth Circuit's rigid six-month

must reject Aliens' request to promulgate a constitutional rule in favor of those with no right to be here in the first place.

1. The six-month trigger does not apply to the Arriving Class of aliens.

Although this Court has not recently addressed the detention rights of non-criminal aliens like the Arriving Class, that subclass faces the same result as the Mandatory Class. In *Mezei*, 345 U.S. at 215, this Court held that "temporary harborage" such as detaining an alien at Ellis Island in lieu of rejecting him at the border was "an act of legislative grace" that "bestows no additional rights" on the alien. *Amicus* EFELDF respectfully submits that this Court must hold to the rule established in *Mezei* and its progeny.

Aliens claim that the Arriving Class "have a right that Congress has afforded them to be here while their asylum claim is pending." Alien Suppl. Br. at 10. But Aliens cannot cherry-pick their rights: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," *Mezei*, 345 U.S. at 212 (interior quotations omitted). Aliens cannot take the right to be here – detained, unless released by discretion – and then pare away detention via the Due Process Clause. The right that is afforded them is the right that they get.[17]

---

deadline "would require this Court to engage in legislative or rulemaking activity," *id.* at 523, which would be inappropriate here. *See* Section I.E, *supra* (no basis for declaratory relief).

[17] Of course, under *Zadvydas*, detention must be in furtherance of removal proceedings and not punishment, but there is no allegation that the detentions here are punitive in that sense.

Similarly, Aliens reject the Government's reliance on the "deferential standard" based on "facially legitimate and bona fide" justifications as resting on admission, not on detention. *Compare* Aliens Suppl. Br. at 14 *with Fiallo ex rel. Rodriguez v. Bell*, 430 U.S. 787, 794-95 (1977). But as to the Arriving Class, this *is* an admission case.

As this Court has recognized, Congress found that "'aliens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others.'" *Demore*, 538 U.S. at 518 (*quoting* S. Rep. No. 104-249, at 7 (1996)). Congress plausibly might have viewed this as a basis for detaining the Arriving Class members until their immigration process resolved.

2. The six-month trigger does not apply to the Mandatory Class of aliens.

With regard to the Mandatory Class, this Court has already held that the "justifiabl[e] concern[] that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers" entitled Congress to "require that persons such as [the LPR there] be detained for the brief period necessary for their removal proceedings." *Demore*, 538 U.S. at 513. Significantly, "Congress adopted this provision against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens." *Id.* at 518 (citing legislative record). It would be remarkable for this Court to second-guess Congress on this issue, given the plenary authority that Congress possesses in this field. *Mandel*, 408 U.S. at 766 (recognizing "Congress' plenary power to make rules for the

admission of aliens and to exclude those who possess those characteristics which Congress has forbidden") (interior quotations omitted). There is no legitimate basis for this Court to interject itself into this area of congressional authority now.

B. The Constitution does not support the Ninth Circuit's procedural demands.

If it reaches the merits, this Court should not extend the procedural rules that the Ninth Circuit purports to have written into the Constitution.

1. The Government does not bear the burden of proof on flight risk or danger to the community.

The lower courts' injunction places the burden of proof[18] on the Government for flight risk and danger to the community, which is counter to both the history of immigration issues in this Court and the default common-law rule placing the burden of proof on the movant (here, the detainee seeking bail, contrary to the Government's desire to continue to hold that detainee). Both reasons compel this Court to reverse the Ninth Circuit on the burden of proof, even if the Court upholds the injunction otherwise.

First, immigration law supports retaining the burden of proof with the immigrant who seeks bail. In *Zadvydas*, the petitioner bore the burden, which this Court accepted. 533 U.S. at 683, 692. Similarly, in *Carlson v. Landon*, 342 U.S. 524, 538 (1952), the Court allowed the Government to hold aliens without

---

[18] The term "burden of proof" encompasses both the burden of persuasion and the burden of production. *Schaffer v. Weast*, 546 U.S. 49, 56 (2005).

bail, pending deportation, based on *systemic* criteria under the statute, without an individualized determination. As *Demore* explains, the Government "could deny bail to the detainees by reference to the legislative scheme even without any finding of flight risk." 538 U.S. at 524 (interior quotations omitted). To move the burden of proof to the Government would require this Court to reverse these decisions and that history, which would be difficult to justify against the plenary authority that Congress and its Executive-Branch delegates enjoy here.

Second, the common-law default is for the plaintiff or movant in civil litigation to bear the burden of proof when the statute is otherwise silent. *Schaffer*, 546 U.S. at 56. Even Aliens do not ask this Court to hold them *entitled* to release. As such, Aliens are the party seeking relief, and the default rule places the burden on them.

2. If the government bore the burden of proof, the quantum of proof would not be clear and convincing evidence.

In addition to requiring periodic hearings at which the Government bears the burden of proof, the lower courts' injunction requires the Government to make its flight-risk and community-danger showings by clear and convincing evidence. Because this is a rational-basis context in which Aliens have no right to release, Section II.A, *supra*, *amicus* EFELDF respectfully submits that there is no basis for this Court to elevate the showing that the Government must make, even assuming *arguendo* that the Government bears the burden at all. *See* Section II.B.1, *supra*. Processing

immigrants is a core function of the Executive Branch, as is defending the border. *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Zadvydas*, 533 U.S. at 700. There is no good reason – much less authority – for federal courts to stand in the way.

3. The Constitution does not compel new hearings, automatically, every six months, without material change to a detainee's circumstances.

In addition to the other procedural advantages that they seek, Aliens also asked the lower courts to ensure that detention time would weigh in the bail analysis, even if not caused by the Government. *Amicus* EFELDF respectfully submits that, even if Aliens are right that lengthy proceedings currently correlate with meritorious cases and aliens who would not abscond, lest they lose their meritorious case, Transcript, at 52:9-19, adopting the injunction that Aliens propose would likely trigger expanded legal activity on by detainees, without the same alleged level of correlation with merit: if the system values delay for detainees, then detainees will introduce more delay. At the very least, it is clear under the rational-basis test that reviewing courts must weigh not only the bases on which Congress *acted*, but also those on which it *plausibly may have acted*. *Beach Communications*, 508 U.S. at 313; *Lehnhausen*, 410 U.S. at 364. Under that test, had Congress considered the issue, Congress reasonably could have concluded that counting delay to detainees' benefit would lead to more delay in detainee proceedings; Congress could plausibly have rejected Aliens' proposal to avoid the increased delay that the proposal likely would cause.

While that would be reason enough to reject this facet of the lower courts' injunction, *amicus* EFELDF notes that the time for seeking judicial review of the bail-hearing regulation, 8 C.F.R. §1003.19(e), has run. 28 U.S.C. §2401(a). Normally, a party like Aliens who seeks to invalidate a rule based on criteria not raised during notice-and-comment and outside the statute of limitations for judicial review must first petition the agency to amend or repeal its rule in light of the new information (*e.g.*, Aliens' theories about the length of the detention correlating with meritorious cases and a preference for intensive supervision). *See* 5 U.S.C. §553(e); *Auer v. Robbins*, 519 U.S. 452, 459 (1997); *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S.Ct. 1378, 1389 (2015) (Breyer, J., concurring in part and concurring in the judgment). *Amicus* EFELDF is not aware that Aliens have established an entitlement to evade the normal perquisites for systemic review of agency rules on this point.

CONCLUSION

The decision of the Ninth Circuit should be reversed.

February 10, 2017

Respectfully submitted,

Lawrence J. Joseph
1250 Connecticut Ave. NW
Suite 200
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for *Amicus Curiae*